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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN WILLIAM KAIPO ENOS, an
individual and JOHNSON
ENTERTAINMENT, LLC, a Native
Hawaii limited liability company,

Plaintiffs,

v.

THE WALT DISNEY COMPANY, a
Delaware corporation; DISNEY
ENTERPRISES, INC., a Delaware
corporation; and DOES 1-10, inclusive,

Defendants.

CASE NO. 2:23-cv-05790-DSF-AGR

Hon. Dale S. Fischer

**REPLY IN SUPPORT OF
DEFENDANTS THE WALT
DISNEY COMPANY AND DISNEY
ENTERPRISES, INC.'S MOTION
FOR SUMMARY JUDGMENT**

Date: April 7, 2025
Time: 1:30 p.m.
Courtroom: 7D (First Street Courthouse)

Complaint Filed: July 18, 2023
SAC Filed: November 22, 2023
Trial Date: July 29, 2025

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I. INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiffs have not met their burden to provide evidence of any disputed material facts. Instead, they deploy overblown rhetoric and a smokescreen of irrelevant facts and arguments, but the evidentiary record is clear: Plaintiffs' claims fail as a matter of law. Cutting through the dissimulation, Plaintiffs have failed to present genuine factual disputes on the key issues that bar their copyright claim: (1) Plaintiffs cannot premise any claim on Ukulele Honu, or Honu as a character, (2) Plaintiffs cannot establish a chain of events, widespread dissemination, or striking similarity, and (3) 'Olu Mel is not substantially similar to Standing Honu or the Honu Mascot.¹ Plaintiffs also presented no evidence to contradict that (1) laches bars Plaintiffs' trademark claims, (2) Plaintiffs cannot establish prior use of a protectable mark, and (3) Plaintiffs have no evidence that consumers were or are likely to be confused about Honu or 'Olu Mel. Any of these defects alone bars Plaintiffs' copyright and trademark claims.

Rather than address these determinative issues head on, Plaintiffs seek to distract from them by emphasizing points that are irrelevant to the merits. To begin, Plaintiffs lead with their chin by arguing "[n]othing has changed since this Court denied Disney's Motion to Dismiss[.]" Opp. at 7. Not true. Discovery uncovered numerous significant and undisputed facts fatal to Plaintiffs' claims.

First, the evidence shows Defendants designed a blue-eyed, ***ukulele-playing*** turtle character ***before*** Plaintiffs sketched Honu with a ukelele. Indeed, Disney announced their turtle ***before*** Plaintiffs publicly launched Ukulele Honu (which was the Honu the Court considered in connection with Defendants' Motion to Dismiss). If the concept of a turtle playing a ukulele were protectable (it is not), Disney was the first to use it. Indeed, any infringement assessment must be based on Honu as he actually first appeared: a standing, blue-eyed turtle with *no* ukulele.

Second, Plaintiffs misleadingly alleged (and argued in opposing Disney's

¹ Defined terms have the same meaning as in Defendants' moving brief.

1 Motion to Dismiss) that “Honu” is the “main character” of the *Honu by the Sea*
2 Show (Doc. 18, ¶ 11). The evidence adduced in discovery shows that is false.
3 Honu has no substantive role in the Show, is not listed in the cast as a character in
4 the Show, and, prior to ‘Olu Mel’s development, had no delineated character traits.

5 *Third*, discovery has shown that Enos’ scattered connections to Disney over
6 the years had little to nothing to do with Honu, and none of Enos’ connections at
7 Disney were involved in or tie back to the creation of ‘Olu Mel.

8 *Fourth*, the facts unequivocally show Plaintiffs knew of Defendants’ turtle
9 character in July 2018, but sat idle for nearly five years, after the limitations period
10 for their Lanham Act claim had lapsed. And while Plaintiffs claim rights in a wide
11 variety of words and images, they have no evidence of prior use of those words or
12 images in a source-designating manner, which is fatal to their Lanham Act claim.

13 Ultimately, Plaintiffs manufactured disputes are misguided, either because
14 they are not supported by evidence, not genuine, or utterly immaterial. What
15 actually matters is whether Plaintiffs were able to present evidence that would raise
16 a genuine issue of disputed material fact as to the necessary elements of their
17 claims. They did not. Defendants’ motion should be granted.

18 **II. PLAINTIFFS’ COPYRIGHT CLAIM FAILS**

19 **A. Plaintiffs Cannot Prove Infringement Of Ukulele Honu Or Of** 20 **Honu As A Character**

21 From the start, Plaintiffs described their purported Honu character as “a
22 green and yellow sea turtle with blue eyes who plays the ukulele.” Doc. 1 at ¶ 11.
23 In ruling on Disney’s Motion to Dismiss, the Court held Plaintiffs had adequately
24 alleged a claim based on its assessment of “Honu the blue-eyed ukulele-playing
25 turtle” – *i.e.*, Ukulele Honu. Doc. 34 at 11. Now that discovery has been
26 completed, Plaintiffs have not—and cannot—genuinely dispute that Disney
27 designed a blue-eyed, ukulele-playing turtle character *before* Plaintiffs created
28 theirs. SUF 77, 36-37. Therefore, as a matter of law, Plaintiffs’ copyright

1 infringement claim cannot be premised on Ukulele Honu. Mot. at 20-21. Instead,
2 Plaintiffs' infringement claim must be evaluated based on Honu *as it existed prior*
3 *to the design of 'Olu Mel*, in at latest, August 2016 (SUF 77, 80, 81).²

4 While Plaintiffs may have a protectable copyright interest in some specific
5 artistic depiction of Honu that existed before 'Olu Mel, Plaintiffs cannot base their
6 copyright claim on Honu *as a character*, beyond what was fixed in a tangible
7 medium. Plaintiffs concede that, under the *Towle* test, a copyrightable character
8 must have "physical as well as conceptual qualities," be "sufficiently delineated,"
9 and "be especially distinctive and contain some unique elements of expression."
10 Opp. at 20. Yet Plaintiffs do not identify a single conceptual quality of Honu as it
11 existed prior to the creation of 'Olu Mel, or explain how any depiction was
12 "especially distinctive" or "unique." Before 2017, Honu publicly existed only as an
13 image of a green turtle with blue eyes (Standing Honu), and sometimes as a mascot
14 at "meet and greets" for the Show (the Honu Mascot).³ SUF 25-26, 29-32, 38, 110.

15 Just as in the cases cited by Defendants (which Plaintiffs do not distinguish),
16 these simplistic depictions convey nothing about Honu's supposed personality or
17 character traits, and Plaintiff point to no other expression of any traits prior to
18 2018. Mot. at 22. Plaintiffs also do not genuinely dispute that numerous blue-eyed
19 turtle characters predate Honu, which belies any claim that those basic design
20 elements are sufficiently unique to warrant protection as a character. SUF 149-151.

21
22 ² The name change from 'Olu to 'Olu Mel is irrelevant to Plaintiffs' copyright
23 claim, as "copyright law does not protect the name or the general idea for a
24 character," but rather its artistic rendition. Compendium of U.S. Copyright Office
Practices §313.4(H). Significantly, Plaintiffs do not identify any notable difference
in the fundamental artistic rendition of 'Olu in 2018 and 'Olu Mel in 2020.

25 ³ Plaintiffs claim Honu appeared at Hello Kitty shows (Opp. at 19), but those
26 shows were in 2018/2019, *after* Disney developed 'Olu Mel. SUF 217-220. And
any protectable depiction must be registered and fixed in a tangible medium, which
forecloses reliance on such appearances or unregistered works. *See Pringle v.*
27 *Adams*, 2012 WL 1103939, at *4 (C.D. Cal. Mar. 30, 2012) (registered works were
"only two works on which [Plaintiffs'] copyright suit can be based."), *aff'd*, 556 F.
28 App'x 586 (9th Cir. 2014); *Phillies v. Harrison/Erickson*, 2021 WL 5936523, at
*24 (S.D.N.Y. Aug. 10, 2021) (mascot performances did "not delineate a character
of sufficient unique expression to warrant copyright protectability").

1 For these reasons, Plaintiffs needed to establish a disputed issue of material
2 fact regarding infringement of Honu as originally depicted, i.e., a standing turtle,
3 with blue eyes but no other distinguishing features. Plaintiffs failed to do so.

4 **B. Plaintiffs Cannot Establish Access Or Striking Similarity**

5 To survive summary judgment, Plaintiffs needed to present “‘significant,
6 affirmative and probative’ evidence” of access. Mot. at 23. They have not done so.

7 **Chain of Events.** Plaintiffs claim, without evidence, that multiple “high
8 level” Disney employees were aware of or had the opportunity to view Honu, to
9 support a “chain of events” access theory. Opp. at 24. While Plaintiffs claim Enos
10 interacted with multiple Disney employees (or former Disney employees), there is
11 no evidence those employees were involved with ‘Olu Mel. Also, these
12 interactions (i) did not relate to Honu or the Show (SUF 173-74, 178-179, 182-89),
13 or, (ii) concerned the mere *idea* of the Show or Honu (SUF 175-77, 181), before
14 either had premiered (SUF 190, 195), or, (iii) pertained to a version of the Show
15 that had no character named Honu, nor Standing Honu in the Program or the Honu
16 Mascot at a “meet and greet,” or any other depiction of Honu (SUF 10, 24, 191-
17 192, 195). Establishing access requires that a plaintiff shared something concrete,
18 like a script or film, which embodies the actual copyrighted work at issue.⁴ Here,
19 Plaintiffs presented no evidence Enos shared an actual depiction of Honu with
20 anyone involved in creating ‘Olu Mel. Plaintiffs’ random connections with persons
21 uninvolved in ‘Olu Mel’s creation do not raise a genuine dispute as to access.

22 To forestall summary judgment, Plaintiffs must demonstrate that someone
23 involved in creating ‘Olu Mel had seen an image of Standing Honu or the Honu
24 Mascot *prior* to creating ‘Olu Mel. *See* Mot. at 23-25. The only Disney employee
25 Plaintiffs claim *may* have been exposed to an actual depiction of Honu is Marilyn
26 Magness, when she purportedly attended a Show in 2015 that included Honu in

27 _____
28 ⁴ *Cf., e.g., Wilson v. Walt Disney Co.*, 123 F. Supp. 3d 1172, 1174 (N.D. Cal. 2015)
(evidence that film was seen by Pixar employee that interacted “every few months”
with employee “heavily involved” in the creation of the allegedly infringing work).

1 programs or as a mascot. SUF 210. Magness, however, was acting in her personal
2 capacity (SUF 64) at the time, meaning this interaction is *less* than the “bare
3 corporate receipt” routinely found to be insufficient. Mot. at 24, n.6. Moreover,
4 there is no evidence Magness was involved at all with ‘Olu Mel.’⁵ SUF 84.
5 Grasping at straws, Plaintiffs argue “Daniel Jue knows Marilyn Magness and has
6 met her... .” SUF 263. Of course, this ignores what Jue actually said about
7 Magness during his deposition (he “[knew] the name” but had “no idea” when they
8 met). *Id.* More importantly, Plaintiffs have no evidence Jue and Magness had any
9 interactions related to Honu or ‘Olu Mel.’⁶ *See Panton v. Strong*, 2018 WL
10 5099666, at *3 (C.D. Cal. Mar. 14, 2018) (access requires “an overlap in subject
11 matter between a plaintiff’s dealings with the alleged intermediary and the
12 intermediary’s dealings with the creator of a defendant’s work.”).

13 Jue having possibly met Magness raises only a “bare possibility” of access
14 based on “mere speculation.” It does *not* establish the “reasonable possibility”
15 required to overcome summary judgment. *Loomis*, 836 F.3d at 996.

16 **Widespread Dissemination.** Neither Standing Honu nor the Honu Mascot
17 (i.e., all that existed prior to the creation of ‘Olu Mel’) were widely disseminated.
18 Widespread dissemination requires that “a work’s degree of commercial success or
19 notoriety ... be ‘substantial.’” *Cope v. Warner Recs., Inc.*, 2023 WL 11827959, at
20 *4 (C.D. Cal. June 5, 2023). Plaintiffs argue Standing Honu was in the Show’s
21 program, or the Honu Mascot appeared for “meet and greets” at a small number of
22

23 ⁵ Plaintiffs’ reference to Bradley Grose is unavailing. Grose did not work at Disney
24 when he worked with Enos, was subject to a non-disclosure agreement, and does
25 not say he shared anything about Honu with anyone involved with ‘Olu Mel.’ SUF
26 67-68. Plaintiffs speculation that a different employee *may* have attended a show in
27 2014 (SUF 199) does “not create a factual dispute for purposes of summary
28 judgment[.]” *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996).

26 ⁶ Plaintiffs claim Defendants’ authorities involved intermediaries “independent” of
27 the accused copier. Opp. at 24. But “a plaintiff ‘cannot create a triable issue of
28 access merely by showing ‘bare corporate receipt’ ... by an individual who shares a
common employer with the alleged copier.’” *Loomis v. Cornish*, 836 F.3d 991, 996
(9th Cir. 2016) (access to employee of defendant insufficient). All Plaintiffs claim
is access by Magness, who had the same employer (Disney) as Olu Mel’s creators.

Shows prior to 2017, but Plaintiffs submitted no evidence regarding audience attendance at those Shows. SUF 198-199, 203-210. They claim they advertised online and on social media (SUF 211-12), but present little evidence about those ads, if they included Honu, when they appeared, or number of viewers. *Cope*, 2023 WL 11827959, at *4 (“the mere availability of a work online is insufficient”). Plaintiffs identify one post on the YouTube page for the Hawaii Theater, but that post had only 1,300 views in *nine years*. SUF 211. Plaintiffs argue they sent press releases to various outlets, but submit no evidence of actual publication of these press releases prior to 2018. SUF 54. That leaves a single *Variety* ad (SUF 200), which falls far short of the widespread dissemination standard.⁷ *Apps v. Universal Music Grp., Inc.*, 283 F. Supp. 3d 946, 955 (D. Nev. 2017) (no widespread dissemination despite multiple performances, posts on YouTube and websites, limited promotion on television and in magazines, and distribution of 2,000 promotional CDs), *aff’d*, 763 F. App’x 599 (9th Cir. 2019). Thousands of sales have been held insufficient (Mot. at 26); here, Plaintiffs point to far less.

Striking Similarity. Plaintiffs do not seriously argue that ‘Olu Mel is strikingly similar to Standing Honu or the Honu Mascot. Striking similarity is a “high bar”; it must be “virtually impossible that the two works could have been independently created.” Mot. at 26. Plaintiffs cannot reach that bar. Plaintiffs do not dispute, *inter alia*, that (i) ‘Olu Mel and Honu are different shades of green (SUF 120), (ii) ‘Olu Mel’s belly is “quite a different yellow” than Honu (SUF 123), (iii) ‘Olu Mel and Honu have different shell colors (SUF 125) and color palettes (SUF 126); and (iiii) the eye shape of Honu is “absolutely not” the same as the eye shape of ‘Olu Mel (SUF 148, 152-153).

It is also undisputed that many purportedly shared features of ‘Olu Mel and Honu – green coloring, yellow bellies, spotting – are found in nature (SUF 118,

⁷ Enos points to ads, press statements, or shows from 2017 or later (SUF 202, 215-220), but access must occur *before* the design of ‘Olu Mel, which was finalized by August 2016, and depicted in many different poses by January 2017. SUF 80-81.

1 121, 127; Mot. at 27), or that blue eyes are a common trait of animated characters
2 in children’s entertainment, including numerous pre-existing animated turtles. SUF
3 149-151, 158. If anything, these “ordinary and common” occurrences indicate “the
4 probability of independent, coincidental production was great.” Mot. at 27. Indeed,
5 Plaintiffs’ own expert conceded the possibility of independent creation.⁸ SUF 171.

6 **C. Plaintiffs Have Not Established Substantial Similarity**

7 Absence of access alone defeats Plaintiffs’ copyright claim. Nor have
8 Plaintiffs raised a genuine dispute as to substantial similarity. They rely on the
9 “ordinary observer” test (*i.e.*, the intrinsic test),⁹ but in the Ninth Circuit, “[f]or
10 summary judgment, only the extrinsic test” – using objective criteria, filtering
11 unprotectable elements (Mot. at 31) – “is important.” *Kouf v. Walt Disney Pictures*
12 *& Television*, 16 F.3d 1042, 1045 (9th Cir. 1994). Plaintiffs do not apply this test.
13 They do not specify similarities, much less “filter out and disregard the non-
14 protectible elements[.]” *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th
15 Cir. 2002); SUF 168. Anthropomorphic characters will look similar insofar as they
16 are intended to be cartoon versions of real animals. Any similarities arising out of
17 that shared physiognomy must be disregarded. It is undisputed many features of
18 ‘Olu Mel or Honu – *e.g.*, green coloring, spots, or even blue eyes – are common
19 elements found in nature or pre-existing cartoon turtles, and thus unprotectable.
20 *See Esplanade Prods., Inc. v. Walt Disney Co.*, 2017 WL 5635027, at *12 (C.D.
21 Cal. Nov. 8, 2017) (elements “flowing from the very idea of anthropomorphizing
22 animals” not protectable), *aff’d*, 768 F. App’x 732 (9th Cir. 2019).

23 Plaintiffs also do not specify what particular “selection and arrangement of
24 unprotectable elements” that existed before ‘Olu Mel they believe has been
25 infringed (Mot. at 32-33), nor dispute that ‘Olu Mel does not share the “same”

26 _____
27 ⁸ Weiman’s bare conclusions also do not create a disputed issue of fact. *Stabile v.*
Paul Smith Ltd., 137 F. Supp. 3d 1173, 1190 (C.D. Cal. 2015) (no dispute based on
28 “[an expert] reciting the magic words ‘strikingly similar’”).

⁹ *Sid & Marty Krofft Tele. Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1166
(9th Cir. 1977), concerned the intrinsic test, inapplicable on summary judgment.

1 combination of elements, given the numerous admitted differences in expression.
2 *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1075
3 (9th Cir. 2020). Plaintiff also do not dispute Honu is simply a cartoon turtle subject
4 to only thin protection against “virtually identical copying” (Mot. at 33), or that
5 ‘Olu Mel is **not** “virtually identical” to Standing Honu or the Honu Mascot.

6 Plaintiffs’ only other argument is that their expert creates a genuine dispute.
7 Opp. at 27-28. An expert report alone does not *ipso facto* defeat summary
8 judgment, particularly where, as here, there is no evidence **any** images Weiman
9 analyzed existed before ‘Olu Mel’s creation. SUF 167, 170. Plaintiffs also concede
10 Weiman did not filter out unprotectable expression (SUF 168-169), making his
11 report “invalid under the extrinsic test” and “legally irrelevant.” *Johannsongs-*
12 *Publ’g Ltd. v. Lovland*, 2020 WL 2315805, at *6-7 (C.D. Cal. Apr. 3, 2020), *aff’d*,
13 2021 WL 5564626 (9th Cir. Nov. 29, 2021) (defense expert “unrebutted” where
14 plaintiff’s expert did not filter unprotectable elements); *accord Stone v. Carey*, No.
15 2:23-cv-09216-MRA, Dkt. 85 at 16-19 (C.D. Cal. March 19, 2025).

16 **III. PLAINTIFFS’ LANHAM ACT CLAIM FAILS**

17 **A. Plaintiffs Cannot Overcome The Strong Presumption Of Laches**

18 Plaintiffs devote only two paragraphs to laches, a complete defense to their
19 Lanham Act claims. Relying solely on the red herring that ‘Olu Mel was initially
20 named ‘Olu, Plaintiffs argue “it is likely” no cause of action accrued until Spring
21 2020 when Disney began using the name ‘Olu Mel. Opp. at 35. But “[l]aches runs
22 ‘from the time the plaintiff knew or should have known about its *potential* cause of
23 action.’” *Harman Int’l Indus., Inc. v. Jem Accessories, Inc.*, 668 F. Supp. 3d 1025,
24 1037 (C.D. Cal. 2023), *aff’d*, 2024 WL 4750497 (9th Cir. Nov. 12, 2024). Enos
25 admitted he was told in 2018 that Disney released a blue-eyed turtle character that
26 “looked like just [*sic*] Honu.” SUF 92. Even in 2018 Enos believed that the name
27 ‘Olu was an issue, because ‘Olu was “just like Honu” and both are “Hawaiian
28 names.” *Id.* Plaintiffs still contend “the name ‘Olu ... is similar to Honu.” Opp. at

31. And ‘Olu Mel (by any name) was musical from the start. SUF 88. In other words, Plaintiffs admittedly knew of the fundamental bases of their Lanham Act claim – purportedly similar appearances and names – by, at latest, July 2018.

Plaintiffs also do not explain how the switch from ‘Olu to ‘Olu Mel meaningfully changed anything. Plaintiffs have no evidence they publicly referred to their turtle as “Honu Mele” (much less that they have trademark rights in that phrase), so it is unclear how the change resulted in any increased similarity.¹⁰ *Tillamook Country Smoker, Inc. v. Tillamook Cnty. Creamery Ass’n*, 465 F.3d 1102, 1110 (9th Cir. 2006) (laches applicable despite logo changes that “did not cause a material increase in consumer confusion”). Also irrelevant is the addition of an ‘Olu Mel mascot, which was a natural extension of Disney’s business, just as with any other Disney character. *Id.* (“growth of [defendant’s] existing business and the concomitant increase in its use of the mark” does not preclude laches).

In short, there is no real dispute that Plaintiffs knew of their potential claim by at least 2018, five years before filing suit. Thus, a “strong presumption” in favor of laches applies. Plaintiffs have not attempted to justify their delay or dispute that Defendants suffered prejudice. Mot. at 36-37. Nor do Plaintiffs address the *E-Systems* factors (Mot. at 35-36), much less attempt to argue that their delay was reasonable under those factors, thereby conceding it was not.

B. Plaintiffs Have Not Established Prior Use Of A Protectable Mark

Plaintiffs also mistakenly argue, without citation, that they “are not required to prove infringement of a registered trademark or even an unregistered trademark to prevail on a Lanham Act 43(a) claim.” Opp. at 30. But, they are. The Lanham Act extends “to only two species of the generic tort of unfair competition: infringement of registered trademarks, and false designation of the origin of goods.” *Toho Co. v. Sears, Roebuck & Co.*, 645 F.2d 788, 792 (9th Cir. 1981).

¹⁰ Even as to the longer phrase “the Honu Mele Series,” Plaintiffs identify only a one actual use of that phrase prior to 2020 – in connection with the release of a single CD, with no evidence the CD was even sold to a single person. SUF 225.

1 “[F]alse designation of origin ... requires proof of the same elements as a claim for
2 trademark infringement” *Kythera Biopharmaceuticals, Inc. v. Lithera, Inc.*,
3 998 F. Supp. 2d 890, 897 (C.D. Cal. 2014). And “to prevail on a claim of
4 trademark infringement ... a party ‘must prove: (1) that it has a protectible
5 ownership interest in the mark; and (2) that the defendant’s use of the mark is
6 likely to cause consumer confusion.’” *Good Meat Project v. GOOD Meat, Inc.*,
7 716 F. Supp. 3d 783, 796–97 (N.D. Cal. 2024). Thus, to defeat summary judgment,
8 Plaintiffs must identify *some* protectable interest in a trademark or trade dress,
9 registered or not. *Fastcap, LLC v. Harbor Freight Tools*, 2008 WL 11336786, at
10 *3 (C.D. Cal. Jan. 14, 2008) (while “Section 43(a) of the Lanham Act protects both
11 registered and unregistered trademarks alike, it is nonetheless the plaintiff’s burden
12 to make a showing of the validity of its unregistered mark.”). Other than the
13 Registered Mark (which is presumed valid), Plaintiffs have not done so.

14 Plaintiffs do not argue they have a protectable right in the generic Hawaiian
15 words “honu” or “mele,” and cannot premise their Lanham Act claim on those
16 words. *See Orgain, Inc. v. N. Innovations Holding Corp.*, 2021 WL 1321653, at *9
17 (C.D. Cal. Mar. 22, 2021) (“plaintiff asserting an unregistered mark ... carries the
18 burden of proving [it] is not generic.”). They also have not demonstrated they used
19 an image of Honu in a source designating manner prior to the debut of ‘Olu Mel
20 (Mot. at 38), other than *perhaps* the Registered Mark. *SUF* 193, 55. Nor have they
21 articulated any protectable trade dress, much less proffered evidence that it is
22 inherently distinctive or acquired secondary meaning. *See EZ Pedo, Inc. v. Mayclin*
23 *Dental Studio, Inc.*, 284 F. Supp. 3d 1065, 1071 (E.D. Cal. 2018) (noting
24 “strenuous burden to show the claimed trade dress serves the role of identifying the
25 owner as a source”), *aff’d*, 765 F. App’x 323 (9th Cir. 2019). They also do not
26 dispute that most of their registered trademarks are irrelevant, either because they
27 are foreign or were not used until after ‘Olu Mel was released. Mot. at 37.

28 Without evidence Plaintiffs have any protectable rights in and priority of use

1 of any word, phrase, or image (or combination thereof), it is simply irrelevant
2 whether Disney used anything similar. Plaintiffs thus fail to raise a genuine dispute
3 as to a fundamental element of its Lanham Act claim – ownership of a registered or
4 unregistered trademark or trade dress, other than the Registered Mark.¹¹

5 **C. Plaintiffs Do Not Show Likelihood of Confusion**

6 Plaintiffs have not met their burden of establishing protectable rights in any
7 trademark other than the Registered Mark; thus, any likelihood of confusion
8 analysis must be limited to that Mark. Plaintiffs’ cursory analysis, however, fails to
9 identify what mark it is assessing, much less properly compare it to any mark used
10 by Defendants. Plaintiffs’ conclusory contentions regarding the *Sleekcraft* factors,
11 untethered to any protectable mark and unsupported by a single citation to
12 evidence, are insufficient to raise a genuine dispute. *Nguyen v. McHugh*, 65 F.
13 Supp. 3d 873, 887 (N.D. Cal. 2014) (declining to consider “bare factual assertions
14 and conclusory statements unsupported by specific evidence”), *aff’d sub nom.*
15 *Huyen Nguyen v. Esper*, 722 F. App’x 688 (9th Cir. 2018); *Carmen v. S.F. Unified*
16 *Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) (affirming summary judgment
17 where plaintiff failed to identify parts of the record showing a genuine dispute).

18 Even if the Court were to consider Plaintiffs’ unsupported contentions, they
19 do not raise a genuine likelihood of confusion dispute. **First**, Plaintiffs have not
20 shown the strength of any ‘Olu Mel mark. While they accurately claim Defendants
21 developed numerous ‘Olu Mel products, they point to no evidence of what marks
22 Defendants actually used in connection with those products, or the strength of
23 those marks amongst consumers. **Second**, Plaintiffs do not assess the similarity of
24 the marks, claiming only that it “has already been reviewed by the Court in
25 denying the Motion to Dismiss.” Opp. at 34. But that decision was not limited to

26 _____
27 ¹¹ Many of Plaintiffs’ contentions fall on inspection. For example, Plaintiffs claim
28 Disney “[p]romot[ed] World Ocean Day” (Opp. at 33), but point only to the
personal LinkedIn page of a *former* Disney employee. Aaronson Decl., Ex. 23.
Plaintiffs also emphasize an image of ‘Olu Mel on a beach with a sea star (Opp. at
32), but provide no explanation of where this image came from. SUF 230.

1 the Registered Mark, as it must be (ECF 34), and Plaintiffs do not dispute there is
2 no similarity between the Registered Mark – a composite mark without color that
3 prominently features the phrase “Honu by the Sea” (SUF 193) – and any mark
4 utilized by Disney. **Third**, Plaintiffs claim proximity of goods because “[b]oth are
5 heavily promoted and marketed in Hawai’i.” Opp. at 34. But this factor considers
6 *types* of goods, not where they are marketed. **Fourth**, Plaintiffs claim (without
7 evidence) all parties “marketed at theme parks and similar locations.”¹² *Id.* Yet
8 there is no evidence of any marketing or distribution at the *same* location;
9 Plaintiffs do not dispute ‘Olu Mel products are sold through Disney outlets (SUF
10 96), not anywhere Honu products are sold. **Fifth**, Plaintiffs claim their consumers
11 are primarily children, but point to no evidence of this (or really any consumers at
12 all for that matter). **Sixth**, as to actual confusion, Plaintiffs point to no evidence,
13 survey or otherwise, of the only type of confusion that is relevant here, *i.e.*, anyone
14 believing that Disney is the source of a Honu product.¹³ Mot. at 42. Whether
15 someone mistakenly believed that ‘Olu Mel is a sea turtle is entirely irrelevant.¹⁴
16 **Seventh**, Plaintiffs point to no evidence of *relevant* bad intent, *i.e.*, whether
17 Defendants “flooded the market or ... intentionally disregarded the risk of reverse
18 confusion.” *Good Meat Project*, 716 F. Supp. 3d at 803. **Eighth**, Plaintiffs do not
19 address the expansion factor, conceding it weighs against confusion.

20 In sum, Plaintiffs have not carried their burden of establishing that *any*
21 *Sleekcraft* factor weighs in favor of confusion, much less most of them.

22 **IV. CONCLUSION**

23 For the reasons set forth herein and in Defendants’ Motion, Plaintiffs’ claims
24 should be dismissed in their entirety.

25 _____
26 ¹² Plaintiffs identify no marketing of goods using the Registered Mark at any U.S.
theme park, but rather just two *performances* at a park *in Japan*. SUF 219-220.

27 ¹³ Enos references a photograph of a child holding an ‘Olu Mel doll standing next
to a cut-out of Honu (SUF 280), but with zero evidence anyone was confused.

28 ¹⁴ Regardless of what ‘Olu Mel may have been called, he very clearly does not have
the anatomical traits of a sea turtle because he does not have fins.

1 DATED: March 21, 2025

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2
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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants The Walt Disney Company, and Disney Enterprises, Inc., certifies that this brief contains **12 pages**, which complies with this Court's Standing Order, Dkt. 12.

Dated: March 21, 2025

/s/ Lucia E. Coyoca

Lucia Coyoca